

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

PW EAGLE, INC.,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY, AND  
LILYBLAD PETROLEUM, INC.,

Respondents.

PCHB NO. 05-119

**ORDER OF DISMISSAL**

This is an appeal of an Ecology decision on a clean-up proposal under the Model Toxics Control Act, Chapter 70.105D RCW. The matter is before the Pollution Control Hearings Board (“Board”) on Ecology’s Motion to Dismiss. Attorney Mike Lufkin represented PW Eagle, Inc. Assistant Attorneys General Andrew Fitz and John T. Cooke represented Ecology. Attorney Richard Griffith represented Lilyblad Petroleum. The Board consisted of Bill Clarke, Presiding, and William H. Lynch. The motion was decided on the written record, consisting of:

1. Ecology’s Motion and Memorandum to Dismiss PW Eagle’s Appeal for Lack of Subject-Matter Jurisdiction;
2. PW Eagle’s Response to Ecology’s Motion to Dismiss;
3. Ecology’s Reply in Support of Motion to Dismiss; and
4. Lilyblad’s Reply to PW Eagle’s Response to Ecology’s Motion to Dismiss.

**I. BACKGROUND**

[1]

PW Eagle and Lilyblad own adjacent properties in an industrial area of Tacoma. PW Eagle manufactures PVC pipe. Lilyblad’s facility was used for hazardous waste treatment,

1 storage, and disposal. Hazardous substances released from Lilyblad's operations have  
2 contaminated soil and groundwater on portions of both the PW Eagle and Lilyblad properties.

3 In 1995, Ecology and Lilyblad entered into a MTCA Agreed Order requiring Lilyblad to  
4 undertake remedial measures to clean up the Lilyblad site, which includes the PW Eagle  
5 property. In 1997, PW Eagle filed suit against Lilyblad in federal court to require Lilyblad to  
6 cleanup the PW Eagle property. In 2000, PW Eagle and Lilyblad entered into a settlement  
7 agreement under which Lilyblad agreed to clean up the PW Eagle property. The 2000  
8 Settlement Agreement established an escrow account for funds to be used solely for cleaning up  
9 PW Eagle's property.

## 10 [2]

11 From March 2004 until July 2005, PW Eagle, Lilyblad, and Ecology engaged in a series  
12 of meetings and correspondence on cleanup issues, including what areas of the site would be  
13 cleaned up first, and the financial resources available for cleanup. These exchanges ultimately  
14 led to a July 29, 2005 letter decision by Ecology denying approval of a Conceptual Cleanup Plan  
15 ("CCP") relating to PW Eagle's property. PW Eagle appealed that letter decision to the Board.

## 16 II. ANALYSIS

### 17 [1]

18 Ecology's Motion to Dismiss is based solely on the Board's jurisdiction. Ecology's  
19 argument is that its CCP letter decision of July 29, 2005 is a remedial decision under MTCA,  
20 over which the Board has no jurisdiction. PW Eagle contends that Ecology's CCP letter decision  
21 is not a remedial decision under MTCA, and that the Board has jurisdiction based on RCW

1 43.21B.110(1)(h). The Legislature has granted the Board jurisdiction over the following  
2 appeals:

3 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, 70.105.080,  
4 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and 90.56.330.

5 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211,  
6 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, 90.48.120, and 90.56.330.

7 (c) Except as provided in RCW 90.03.210(2), the issuance, modification, or  
8 termination of any permit, certificate, or license by the department or any air  
9 authority in the exercise of its jurisdiction, including the issuance or termination of a  
10 waste disposal permit, the denial of an application for a waste disposal permit, the  
11 modification of the conditions or the terms of a waste disposal permit, or a decision to  
12 approve or deny an application for a solid waste permit exemption under RCW  
13 70.95.300.

14 (d) Decisions of local health departments regarding the grant or denial of solid waste  
15 permits pursuant to chapter 70.95 RCW.

16 (e) Decisions of local health departments regarding the issuance and enforcement of  
17 permits to use or dispose of biosolids under RCW 70.95J.080.

18 (f) Decisions of the department regarding waste-derived fertilizer or micronutrient  
19 fertilizer under RCW 15.54.820, and decisions of the department regarding waste-  
20 derived soil amendments under RCW 70.95.205.

21 (g) Decisions of local conservation districts related to the denial of approval or denial  
of certification of a dairy nutrient management plan; conditions contained in a plan;  
application of any dairy nutrient management practices, standards, methods, and  
technologies to a particular dairy farm; and failure to adhere to the plan review and  
approval timelines in RCW 90.64.026.

(h) Any other decision by the department or an air authority which pursuant to law  
must be decided as an adjudicative proceeding under chapter 34.05 RCW.

22 PW Eagle's argument is that while Ecology decisions under Chapter 70.105D RCW are  
23 not specifically listed as a decision over which the Board has jurisdiction, the Board does have  
24 jurisdiction over the provision at RCW 43.21B.110(1)(h), which gives the Board jurisdiction

1 over “Any other decision by [Ecology] . . . which pursuant to law must be decided as an  
2 adjudicative proceeding under chapter 34.05 RCW.”

3 [2]

4 Ecology’s Motion to Dismiss characterizes the Ecology CCP letter decision as a MTCA  
5 remedial decision. PW Eagle contends “there is clearly a factual dispute between PW Eagle and  
6 Ecology as to whether the underlying basis of Ecology’s July 29, 2005 action was a remedial  
7 decision or a financial decision.” (*PW Eagle Response at 9*). This dispute over how the parties  
8 characterize Ecology’s decision is not material to whether the Board has jurisdiction over the  
9 appeal, because the underlying undisputed fact is that the Ecology’s decision was issued pursuant  
10 to MTCA.

11 [3]

12 PW Eagle argues that if the Board does not have jurisdiction, then Ecology’s decision is  
13 unreviewable. This argument is based on RCW 70.105D.060, which provides six different types  
14 of appeals available under MTCA, all of which must be filed in Superior Court. PW Eagle  
15 contends that its appeal is not an appeal of a remedial decision by Ecology subject to the  
16 jurisdictional bar of RCW 70.105D.060, because Ecology acted *ultra vires* to its statutory  
17 authority. PW Eagle cites two cases in which the Board has exercised jurisdiction over  
18 Ecology’s statutory authority: *United States Department of Energy et al. v. Ecology*, PCHB No.  
19 01-134 (2002), and *Lake Entiat Lodge v. Ecology*, PCHB No. 01-025 (2001).

20 [4]

21 In both the *USDOE* and *Lake Entiat Lodge* appeals, however, the Board had jurisdiction,  
not due to the general question of whether Ecology exceeded its statutory authority or acted *ultra*

1 *vires*, but based on the specific Ecology action underlying the appeal. The *USDOE* appeal was  
2 an appeal of a penalty issued under Chapter 70.105 RCW. The *Lake Entiat Lodge* appeal was an  
3 appeal of a groundwater permit decision under Chapter 90.44 RCW. In those cases, the question  
4 of whether Ecology exceeded its statutory authority was raised as a legal issue; it was not the  
5 underlying basis for the Board’s jurisdiction. The Board’s jurisdiction in those cases was based  
6 on the statutes under which the penalty and permit decisions were issued, and both statutes were  
7 explicitly listed in the Board’s jurisdictional statute.

8 [5]

9 The Board has previously held that it did not have jurisdiction over Ecology’s  
10 determination of a “potentially liable party” pursuant to RCW 70.105D.020(8) and RCW  
11 70.105D.040. The Board found that the language RCW 70.105D.060 is clear and unambiguous,  
12 and that such an appeal would be exclusively in superior court. Further, the Board found that the  
13 definition of “adjudicative hearing” at RCW 34.05.010(1) does not grant the Board separate  
14 jurisdiction. *U-Haul of Inland Northwest v. Ecology*, PCHB No. 91-242 (1992).

15 [6]

16 In contrast to the review provision of MTCA that provides for review exclusively in  
17 Superior Court, nowhere in the Board’s statutes is there an indication that the Board has  
18 jurisdiction over Ecology’s MTCA decisions. This specific jurisdictional provision in MTCA  
19 trumps the general jurisdictional provision in RCW 43.21B.110(1)(h). See *Omega National*  
20 *Insurance Company v. Marquardt*, 115 Wn.2d 416, 425, 799 P.2d 235 (1990) (specific statute  
21 controls over a more general statute). Further, an administrative agency has only those powers  
specifically granted by statute or necessarily implied: “The PCHB, being a creature of statute,

1 has only those powers expressly granted to it or necessarily implied therein.” *City of Seattle v.*  
2 *Ecology*, 37 Wn.App. 819, 823, 683 P.2d 244, 246 - 247 (1984)

3 [7]

4 Finally, the Board in this case makes no determination on the apparent dispute between  
5 the parties over whether Ecology’s July 29, 2005 letter decision was a “remedial decision” under  
6 MTCA, a “financial decision,” or something else. What matters is that the letter was a decision  
7 under MTCA, and the law is that the Board has no jurisdiction over this decision. Because the  
8 Board has no jurisdiction, it declines to decide whether the decision was a “remedial decision.”  
9 Whether that results in Ecology’s decision being unreviewable depends on MTCA, the APA, or  
10 any other available remedies.

11 [8]

12 Based on the foregoing analysis, the Board enters the following

13 **ORDER**

14 Ecology’s Motion to Dismiss PW Eagle’s Appeal for Lack of Subject Matter Jurisdiction  
15 is GRANTED.

16 SO ORDERED this 9<sup>TH</sup> day of November 2005.

17  
18 **POLLUTION CONTROL HEARINGS BOARD**

19 BILL CLARKE, Presiding

20 WILLIAM H. LYNCH, Member  
21